

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad**

REGIONAL BENCH-COURT NO. 3

Excise Appeal No. 11849 of 2018 - DB

(Arising out of OIA-CCESA-SRT-APP-AT-063-2017-18 dated 28/03/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-II)

Commissioner of C.E. & S.T.-Daman

.....Appellant

3rd Floor...Adarsh Dham Building,
Vapi-Daman Road, Vapi
Opp.Vapi Town Police Station,
Vapi, Gujarat- 396191

VERSUS

Pamis Tex Pvt Ltd

.....Respondent

Survey No. 255/1/16, Athal,
Silvassa, Dadra & Nagar Haveli (Ut)

With

Excise Appeal No. 11850 of 2018 - DB

(Arising out of OIA-CCESA-AUDIT-SRT-VK-031-034-2017-18 dated 27/03/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

Commissioner of C.E & S.T.-Silvasa

.....Appellant

Commissioner Central Excise, Customs & Service Tax,
Silvassa, 4th floor, Adarsh Dham Building,
Vapi Daman Road Vapi
Opp. Old Town Police Station
VAPI, Gujarat

VERSUS

Pamis Tex Pvt Ltd

.....Respondent

Survey No. 255/1/16, Athal,
Silvassa, Dadra & Nagar Haveli (Ut)

APPEARANCE:

Shri Sanjay Kumar Superintendent (AR) for the Appellant
Shri Hardik Modh, Advocate for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR**

Final Order No.11872-11873/2024

DATE OF HEARING: 29.07.2024
DATE OF DECISION: 30.08.2024

RAMESH NAIR

The issue involved in these appeals filed by the revenue is whether the respondent can utilize the Cenvat credit of basic excise duty for payment of National Calamity Contingent Duty (NCCD).

2. Shri Sanjay Kumar, Learned Superintendent (AR) appearing on behalf of the Revenue appellant reiterates the grounds of the appeal. He submits that the basic excise duty cannot be utilized for payment of NCCD. He relied on the judgment of Hon'ble High Court of Sikkim in the case of M/s. Unicorn Industries vs. Union of India reported in 2015(324) ELT 498 (Sikkim) wherein it has been held that NCCD is not an excise duty but a surcharge , therefore, the order passed by the Leaned Commissioner (Appeals) is not legal and correct. Hence, the same needs to be set aside and revenue appeals to be allowed.

3. Shri Hardik Modh, Learned Counsel appearing on behalf of the Respondent submits that now the issue has been settled in various judgments that utilization of basic excise duty for payment of NCCD is permissible in terms of Rule 3 of Cenvat Credit Rules, 2004. He placed reliance on the following judgments:-

- CCE & ST, Silvassa and CCE & ST,Daman vs. Welspun Syntex Ltd and M/s Wellknown Polyester Ltd – 2019 (11) TMI 1268- CESTAT AHMEDABAD
- Commissioner of Central Excise and ST, Silvassa vs. M/s. Sanathan Textiles Pvt. Ltd – 2018 (12) TMI 356- CESTAT Ahmedabad
- Commissioner of Central Excise , Customs and ST, Vapi vs. M/s. Madura Industries Textiles – 2013 (1) TMI 352 – Guj.
- CCE , Dibrugrah vs. Prah Bosimi Synthetics Ltd - 2013 (11) TMI 487- Guwahati
- Union of India vs. Kamakhya Cosmetics & Pharmaceuticals Pvt Ltd - 2012 (7) TMI 902 – Guj.

4. We have carefully considered the submission made by both sides and perused the records. We find that the issue is no longer res- integra and the same is settled in various judgments as cited by the learned counsel. In the case of CCE & ST, Silvassa and CCE & ST, Daman vs. Welspun Syntex

Ltd. and M/s Wellknown Polyester Ltd (Supra), this tribunal passed the following order:-

"The common issue involved in all the three appeals is that whether the appellant can utilize the Cenvat Credit of basic Excise Duty for payment of National Calamity Contingent Duty (NCCD).

2. Shri S.K. Shukla, Learned Superintendent (Authorized Representative) appearing on behalf of the Revenue reiterates the grounds of the appeal. He submitted that as per the Sikkim High Court Judgment in the case of Unicorn Industries vs. Union of India 2015 (324) E.L.T. 498 (Sikkim), the appellant is not entitled to pay National Calamity Contingent Duty from the Cenvat Credit of Basic Excise Duty.

3. Shri S. J. Vyas Learned Counsel appearing on behalf of the Respondent at the outset submits that the issue involved in the present case that the utilization of Cenvat Credit for payment of NCCD has been settled in various judgments including the judgments in the appellants own case. He relied upon the following judgments.

- **Sanathan textile 2018 12 TMI 356 TRI AHD**
- **Prag Bosmi Synthetics- 2013 11 TMI 487 HC Gauhati**
- **Bajaj Auto Ltd- 2019 3 TMI 1427 SC**

4. We heard both the sides and perused the records. We find that the appeal of the revenue is only on the reliance of Hon'ble Sikkim high court judgment in the case of Unicorn Industries vs. Union of India (supra). Whereas we find that on the absolutely identical issue that whether payment of National Calamity Contingent Duty can be made by utilizing the Cenvat Credit of Basic Excise Duty has been dealt with by the Hon'ble Gauhati High Court in the case Union of India Vs. Kamakhya Cosmetics Pharmaceutical Pvt. Ltd., 2015 (323) E.L.T. 33 (Gau.) (Ex.-G) wherein it was held that payment of education cess can be made by utilizing Cenvat Credit of Basic Excise Duty. This judgment was passed relying the same High Court Judgment in the case of CCE, Dibrugarh Vs. Prag Bosimi Synthetics Ltd., 2013 (295) ELT 682 (Gau), wherein the Hon'ble Guwahati High Court has answered a reference whereby it was held that while Cenvat Credit of NCCD can be utilized under the Cenvat Credit Rules only towards payment of such NCC Duty, Cenvat Credit obtained from other sources can be utilized for payment of NCC Duty on the final product. Same view taken by the Hon'ble UttaraKhand High Court in the case of Hero Motocorp Ltd.,

Vs. CCE, Dehradun, 2018 (14) GSTL 200 (Uttarakhand) whereby it was held that NCCD & CESS are part of levies under rule 3(1) of Cenvat Credit Rule, 2004 making an aggregate of Cenvat Credit hence, assessee could make use of Basic Excise Duty for payment of NCCD & CESS. Even in the case of Appellant itself the utilization of credit of basic excise duty for payment of NCCD has been allowed by Revisionary Authority, Department of Revenue Government of India reported as Welspun Corporation Ltd., 2014 (314) ELT 968 (GOI).

5. This Tribunal also in the appellant's case vide order No. A/11583/2016 dated 24.11.2016 dismissed the revenue's appeal filed on the same issue on the same line. As regard the sole reliance of the Revenue on the Judgment of Sikkim High Court in the case of Unicorn Industries vs. Union of India (Supra), We find that issue involved in such case was on exemption from payment of NCCD whereas the issue before us is whether the appellant is entitled to utilize Cenvat Credit of Basic Excise Duty for payment of NCCD. Therefore the judgment of the Sikkim High Court in the case of Unicorn Industries vs. Union of India (Supra) being on entirely different issue is not applicable.

6. In our above observation we are of the clear view that the order passed by the Lower Authority is proper and legal which do not require any interference. Hence, the impugned orders are upheld. Revenue's appeals are dismissed."

4.1. In another judgment in the case of Commissioner of Central Excise and ST, Silvassa vs. M/s. Sanathan Textiles Pvt Ltd (Supra), this tribunal passed the following order :-

"4. I have carefully considered the submissions made by both sides and perused the record. For availment of credit and utilization, there is a provision made in Rule 3 which is reproduced below:-

Rule 3 of Cenvat Credit Rules, 2004

"(1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of -

(i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act;

(ii) the duty of excise specified in the Second Schedule to the Excise Tariff Act, leviable under the Excise Act;

(iii) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978);

(iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

(v) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001);

(vi) the Education Cess on excisable goods leviable under section 91 read with section 93 of the Finance (No.2) Act, 2004 (23 of 2004);

(via) the Secondary and Higher Education Cess on excisable goods leviable under section 136 read with section 138 of the Finance Act, 2007 (22 of 2007);

(vii) the additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v) (vi) and (via);

(viiia) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act,

Provided that a provider of taxable service shall not be eligible to take credit of such additional duty;

(viii) the additional duty of excise leviable under section 157 of the Finance Act, 2003 (32 of 2003);

(ix) the service tax leviable under section 66 of the Finance Act;

(x) the Education Cess on taxable services leviable under section 91 read with section 95 of the Finance (No.2) Act, 2004 (23 of 2004); and

(xa) the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act, 2007 (22 of 2007); and

(xi) the additional duty of excise leviable under section 85 of Finance Act, 2005 (18 of 2005)

Provided that the CENVAT credit shall be allowed to be taken of the amount equal to central excise duty paid on the capital goods at the time of debonding of the unit in terms of the para 8 of notification No. 22/2003-Central Excise, published in the Gazette of India, part II, Section 3, sub-section(i), vide number G.S.R. 265(E), dated, the 31st March, 2003. paid on-

(i) any input or capital goods received in the factory of manufacture of final product or premises of the provider of output service on or after the 10th day of September, 2004; and

(ii) any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004,

including the said duties, or tax, or cess paid on any input or input service, as the case may be, used in the manufacture of intermediate products, by a job-worker availing the benefit of exemption specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 214/86- Central Excise, dated the 25th March, 1986, published in the Gazette of India vide number G.S.R. 547 (E), dated the 25th March, 1986, and received by the manufacturer for use in, or in relation to, the manufacture of final product, on or after the 10th day of September, 2004.

Explanation.- For the removal of doubts it is clarified that the manufacturer of the final products and the provider of output service shall be allowed CENVAT credit of additional duty leviable under section 3 of the Customs Tariff Act on goods falling under heading 9801 of the First Schedule to the Customs Tariff Act.

(2) Notwithstanding anything contained in sub-rule (1), the manufacturer or producer of final products shall be allowed to take CENVAT credit of the duty paid on inputs lying in stock or in process or inputs contained in the final products lying in stock on the date on which any goods manufactured by the said manufacturer or producer cease to be exempted goods or any goods become excisable.

(3) Notwithstanding anything contained in sub-rule (1), in relation to a service which ceases to be an exempted service, the provider of the output service shall be allowed to take CENVAT credit of the duty paid on the inputs received on and after the 10th day of September, 2004 and lying in stock on the date on which any service ceases to be an exempted service and used for providing such service.

(4) The CENVAT credit may be utilized for payment of –

a) **any duty of excise on any final product;** or

b) an amount equal to CENVAT credit taken on inputs if such inputs are removed as such or after being partially processed; or

c) an amount equal to the CENVAT credit taken on capital goods if such capital goods are removed as such; or

d) an amount under sub rule (2) of rule 16 of Central Excise Rules, 2002; or

e) service tax on any output service:

Provided that while paying duty of excise or service tax, as the case may be, the CENVAT credit shall be utilized only to the extent such credit is available on the last day of the month or quarter, as the case may be, for payment of duty or tax relating to that month or the quarter, as the case may be:

Provided further that the CENVAT credit of the duty, or service tax, paid on the inputs, or input services, used in the manufacture of final products cleared after availing of the exemption under the following

notifications of Government of India in the Ministry of Finance (Department of Revenue),-

(i) No. 32/99-Central Excise, dated the 8th July, 1999 [G.S.R. 508(E), dated 8th July, 1999];

(ii) No. 33/99-Central Excise, dated the 8th July, 1999 [G.S.R. 509(E), dated 8th July, 1999];

(iii) No. 39/2001-Central Excise, dated the 31st July, 2001 [G.S.R. 565 (E), dated the 31st July, 2001];

(iv) No. 56/2002-Central Excise, dated 14th November, 2002 [G.S.R. 764(E), dated the 14th November, 2002];

(v) No. 57/2002-Central Excise, dated 14th November, 2002 [G.S.R.. 765(E), dated the 14th November, 2002];

(vi) No. 56/2003-Central Excise, dated the 25th June, 2003 [G.S.R. 513 (E), dated the 25th June, 2003]; and

(vii) No. 71/2003-Central Excise, dated the 9th September, 2003 [G.S.R. 717 (E), dated the 9th Sep, 2003]

shall, respectively, be utilized only for payment of duty on final products, in respect of which exemption under the said respective notifications is availed of:

Provided also that no credit of the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, shall be utilized for payment of service tax on any output service:

Provided also that the CENVAT credit of any duty specified in sub-rule (1), **except the National Calamity Contingent duty in item (v) thereof, shall not be utilized for payment of the said National Calamity Contingent duty on goods falling under tariff items 8517 12 10 and 8517 12 90 respectively of the First Schedule of the Central Excise Tariff:**

Provided also that the CENVAT credit of any duty mentioned in sub-rule (1), other than credit of additional duty of excise leviable under section 85 of Finance Act, 2005 (18 of 2005), shall not be utilised for payment of said additional duty of excise on final products.”

From the reading of the above Rule, in Rule 3 (1)(v), the Cenvat credit includes the NCCD leviable under Section 136 of Finance Act, 2001. As per this provision, credit of NCCD is a Cenvat credit. As regard utilization in terms of Rule 3(4)(a), the Cenvat credit is allowed to be utilized for payment of any duty of excise on any final product. Rule 3(7)(b) provides some restrictions, according to which the cevnat credit in respect of NCCD can be utilized only for payment of NCCD that means, Cenvat credit of NCCD is not allowed to be utilized for payment of basic excise duty. However, similar restriction is not provided for utilization of basic excise duty for payment of NCCD.

5. Therefore, in view of the clear statutory provisions, as discussed above, there is no bar in utilization of basic excise duty for payment of NCCD. This issue has been considered by the Hon'ble Gauhati High Court in the case of CCE, Dibrugarh vs. Prag Bosimi Synthetics Limited – 2013 (295)

ELT 682 (Gau.) wherein the Hon'ble High Court on an identical issue, passed the following judgment:-

"8. *The second part of the substantial question of law would now arise, namely, whether CENVAT credit can be utilized towards payment of NCC duty under the CENVAT Credit Rules.*

9. *In this regard it is necessary to go through the CENVAT Credit Rules, particularly Rule 3(4) and Rule 3(7) thereof.*

10. *Rule 3(1) provides that a manufacturer or producer of a final product shall be allowed to take CENVAT credit of the NCC duty leviable under Section 136 of the Finance Act, 2001. To this extent there is no dispute between the parties.*

11. *Rule 3(4) of the CENVAT Credit Rules is important and this reads as follows :*

(4) The CENVAT credit may be utilized for payment of –

(a) any duty of excise on any final product; or

(b) an amount equal to CENVAT credit taken on inputs if such inputs are removed as such or after being partially processed; or

(c) an amount equal to the CENVAT credit taken on capital goods if such capital goods are removed as such; or

(d) an amount under sub-rule (2) of rule 16 of Central Excise Rules, 2002; or

(e) service tax on any output service :

Provided that while paying duty of excise or service tax, as the case may be, the CENVAT credit shall be utilized only to the extent such credit is available on the last day of the month or quarter, as the case may be, for payment of duty or tax relating to that month or the quarter, as the case may be :

Provided further that the CENVAT credit of the duty, or service tax, paid on the inputs, or input services, used in the manufacture of final products cleared after availing of the exemption under the following notifications of Government of India in the Ministry of Finance (Department of Revenue), -

(i) No. 32/99-Central Excise, dated the 8th July, 1999 [G.S.R. 508(E), dated 8th July, 1999];

(ii) No. 33/99-Central Excise, dated the 8th July, 1999 [G.S.R. 509(E), dated 8th July, 1999];

(iii) No. 39/2001-Central Excise, dated the 31st July, 2001 [G.S.R. 565 (E), dated the 31st July, 2001];

(iv) No. 56/2002-Central Excise, dated the 14th November, 2002 [G.S.R. 764(E), dated the 14th November, 2002];

(v) No. 57/2002-Central Excise, dated 14th November, 2002 [G.S.R. 765(E), dated the 14th November, 2002];

(vi) No. 56/2003-Central Excise, dated the 25th June, 2003 [G.S.R. 513 (E), dated the 25th June, 2003]; and

(vii) No. 71/2003-Central Excise, dated the 9th September, 2003 [G.S.R. 717(E), dated the 9th September, 2003],

shall, respectively, be utilized only for payment of duty on final products, in respect of which exemption under the said respective notifications is availed of.

Rule 3(4) provides that CENVAT credit may be utilized, inter alia, for payment of any duty of excise on any final product. To this extent also there is no dispute between the parties. However, what is of importance is the second proviso to Rule 3(4) of the CENVAT Credit Rules. This provides that the CENVAT credit of duty paid on inputs used in the manufacture of a final product cleared after availing of the exemption under Notification No. 32/99-C.E. shall be utilized only for payment of duty on the final product in respect of which exemption under the said notification is availed of. It is clear from this that CENVAT credit of duty paid on inputs shall be utilized only for payment of duty on the final product for which exemption is availed.

12. Rule 3(7) is equally important and this reads as follows :

(7) Notwithstanding anything contained in sub-rule (1) and sub-rule (4), -

(a)

(b) CENVAT credit in respect of, -

(i)

(ii) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001);

(iii)

(iv)

(v)

(vi)

shall be utilized only towards payment of the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001, respectively, on any final products manufactured by the manufacturer

(words not necessary are deleted)

Rule 3(7) provides that notwithstanding anything contained in sub-rule (1) and sub-rule (4), CENVAT credit in respect of NCC duty shall be utilized only towards payment of the NCC duty under Section 136 of the Finance Act, 2001 on any final product manufactured by the manufacturer.

13. Insofar as the assessee is concerned the contention urged was that CENVAT credit in respect of NCC duty can be utilized only for payment of NCC duty. But this does not mean that CENVAT credit on basic excise duty cannot be utilized for payment of NCC duty on the final product. Simply put, the contention is that payment of NCC duty through utilization of CENVAT credit on basic excise duty is not prohibited. The question is whether this is permissible or not. According to the Revenue, CENVAT credit on NCC duty can be utilized only for paying NCC duty and CENVAT credit on basic excise duty cannot be utilized for paying NCC duty.

14. On the above broad facts, the matter was adjudicated before the Commissioner of Central Excise at Dibrugarh and he came to the conclusion that CENVAT credit of duty paid on inputs can be utilized only for payment of duty on the final product as per the second proviso to Rule 3(4) but CENVAT credit on any other duty could not be utilized for payment of NCC duty. Accordingly, the said Commissioner confirmed the demand of ₹ 82,07,125/- and passed an order for recovery of NCC duty from the assessee.

15. Feeling aggrieved, the assessee preferred an appeal before the Customs, Excise and Service Tax Appellate Tribunal at Kolkata. The appeal filed by the assessee was registered as Excise Appeal EDM 648/2006. The CESTAT noticed the provisions of Rule 3(4) as well as the provisions of Rule 3(7) of the CENVAT Credit Rules and held that though credit of NCC duty could be utilized for paying NCC duty only, the restriction would not extend to utilization of credit of duty which is not specifically listed in Rule 3(7). The corollary to this argument is that since credit on basic excise duty is not mentioned in Rule 3(7), CENVAT credit on basic excise duty could be utilized for payment of NCC duty.

16. We are in agreement with the view expressed by the CESTAT. In terms of Rule 3(1) a manufacturer or producer of a final product is allowed to take CENVAT credit of NCC duty. Since NCC duty is admittedly a duty of excise, Rule 3(4) provides that CENVAT credit may be utilized for payment of any duty of excise on any final product. Therefore, CENVAT credit of NCC duty may also be utilized for payment of any duty of excise on any final product in terms of Rule 3(4) subject to Rule 3(7).

17. Rule 3(7) limits the utilization of CENVAT credit in respect of NCC duty as also other duties mentioned in Rule 3(7)(b). It provides that CENVAT credit in respect of NCC duty and other duties shall be utilized towards payment of duty of excise leviable under various statutes respectively. The use of the word "respectively" in this regard is important inasmuch as it confines the utilization of CENVAT credit obtained to a particular statute and for utilization for payment of duty under that statute only. The converse, however, does not follow. That is to say that merely because CENVAT credit in respect of NCC duty can be utilized only for payment of NCC duty, it does not follow that any other credit of duty cannot be utilized for payment of NCC duty.

18. This being the position, in our opinion the Commissioner of Central Excise at Dibrugarh was in error in coming to the conclusion that CENVAT credit of basic excise duty cannot be utilized for payment of NCC duty on the final product.

19. Under the circumstances the second part of the substantial question of law must be answered in the affirmative and it must be

held that while CENVAT credit of NCC duty can be utilized under the CENVAT Credit Rules only towards payment of such NCC duty, CENVAT credit obtained from other sources can be utilized for payment of NCC duty on the final product.

20. *The reference is answered accordingly."*

The Hon'ble High Court, after interpreting Rule 3(4) and Rule 3(7) came to the conclusion that the Cenvat credit can be utilized towards payment of NCCD in Cenvat credit.

6. In view of the above judgment and the discussion made hereinabove, I do not find any infirmity in the order of the Commissioner (Appeals) and the same is upheld. Revenue's appeal is dismissed"

4.2. From the above decisions of this tribunal it can be seen that the utilization of basic excise duty for the payment of NCCD has been allowed considering the provisions of Rule 3 of Cenvat Credit Rules, 2004. As regard the heavy reliance placed by the revenue in the case of M/s. Unicorn Industries vs. UOI (Supra), in that case the issue was different that whether the NCCD is an excise duty or surcharge. Even though as per the said judgment the NCCD is not an excise duty but a surcharge, rule 3 permits the utilization of basic excise duty for payment of NCCD. Therefore, judgment in the case of M/s. Unicorn Industries vs. UOI (Supra) is not relevant on the issue and facts of the present case. Accordingly, we are of the view that the respondent is correct in utilizing the credit of basic excise duty for payment of NCCD. Therefore, the impugned orders are legal and correct and the same deserve to be sustained.

5. Accordingly, we upheld the impugned orders and dismiss the Revenue's appeals.

(Pronounced in the open court on 30.08.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)